No. 93-630

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS COUNCIL NO. 4434, *et al.*,

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *etc., et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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November 24, 1993

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QUESTIONS PRESENTED

1. In cases brought under the results test of Section 2 of the Voting Rights Act of 1965, as amended, involving judicial elections, what are the standards for measuring whether the challenged electoral system violates the Act?

2. Whether the Court should exercise its supervisory power to correct the Fifth Circuit's error in refusing to grant a joint motion by the plaintiffs and the state to remand the case to the district court for consideration and effectuation of a settlement approved by the Governor, the Attorney General, the Secretary of State, the Lieutenant Governor, the Speaker of the House, and a majority of both houses of the Texas Legislature, but opposed by one of fifteen official-capacity state defendants and two personal-capacity defendant-intervenors?

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COUNCIL NO. 4434, *et al.*,

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *etc.*, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

This memorandum is filed in response to the petition for writ of certiorari filed by twenty-five petitioners, led by the League of United Latin American Citizens Council No. 4434. Hereinafter, they collectively will be termed "LULAC."

The Attorney General of Texas files this memorandum on behalf of the fifteen state respondents who are in this case only in their official capacities. Hereinafter, both for simplicity and because of the rifts explained in the following paragraph, the state respondents collectively will be termed the "state."

The fifteen official-capacity state respondents are: (i) the Attorney General; (ii) the Secretary of State of Texas; and (iii) the thirteen-member Judicial Districts Board of Texas, chaired by the Chief Justice of the Supreme Court of Texas. These state respondents have varying opinions on the proper disposition of this case, and one of them -- the Chief Justice -- retained private counsel to represent his views on settlement to the Fifth Circuit sitting en banc. Inasmuch as the Attorney General perceives his state constitutional duties to require presentation of a unified position for the state under these circumstances, he files this brief on behalf of the state in his capacity as the state's chief legal officer.

OPINIONS BELOW

LULAC's Appendix omits four district court orders modifying the liability determination the court made in the Memorandum Opinion and Order of November 8, 1989. LULAC App. 487a-549a. It also omits the district court's two orders on remedy. The omitted orders constitute the appendix to this memorandum.

STATEMENT OF THE CASE

This case was filed in 1988 and tried to the court in the fall of 1989. Two months later, the district court issued its liability decision, finding violations of section 2 of the Voting Rights Act, as amended, in each of the nine urban counties[1] targeted in the suit, but finding no intentional discrimination and, consequently, no constitutional violation. LULAC App. 487a-549a; State App. 1a-7a. Subject to the challenge at the time of trial

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[1] A tenth county is incidentally implicated because it is combined with one of the nine targeted counties to form one of the challenged judicial districts.

were 172 state district court seats (or judicial districts), constituting 45% of the state's total.

In early January of 1990, the district court issued orders on remedy, directing that the 1990 round of judicial elections for the 115 state district court seats up for election be conducted on a non-partisan basis using a system of subdistricts instead of on a partisan basis using countywide judicial districts. State App. 8a-21a. The Fifth Circuit immediately stayed implementation of the interim remedy.

On the first round of appeals, a panel of the Fifth Circuit split two-to-one and held that Texas trial judges as solo decisionmakers were not subject to the effects prong of amended section 2 of the Voting Rights Act. 902 F.2d 293. Taking the case en banc sua sponte, the full Fifth Circuit then held that the effects prong of the amended section 2 did not cover any judicial elections. 914 F.2d 520. There was a five-member concurrence adopting the panel's rationale, a special concurrence by the Chief Judge, and a solo dissent. This Court then reversed, holding that the decision in *Chisom v. Roemer*, 111 S.Ct. 2354 (1991), that amended section 2 covered judicial elections also applies to district court elections. *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991).

On remand, the original Fifth Circuit panel again split two-to-one. This time, it upheld the district court's liability determination in eight of the nine targeted counties (reversing the liability finding only in Travis County). 986 F.2d 728; LULAC App. 203a-486a. The Fifth Circuit again took the case en banc sua sponte. LULAC App. 486a.

Following the second panel opinion, and between the en banc order and the en banc argument on May 24,

1993, the state and LULAC reached an accord on the merits of the case. In addition to the Attorney General and Secretary of State (who are official-capacity parties), the state's signatories were the Governor, the Lieutenant Governor, and the Speaker of the House. The Texas Legislature followed with majority approval of the accord through a resolution of the state House of Representatives and through a resolution approved by the state Senate sitting as the Committee of the Whole.

Two weeks or so before en banc argument, the state and LULAC filed a joint motion to remand the case to the district court for a fairness hearing on whether the settlement should be approved, modified, or rejected. The settlement would create a subdistricting electoral system in the nine targeted counties, with some countywide district court elections retained in six of the counties, including the two largest, Dallas and Harris.

Two incumbent district court judges -- one from Dallas County and one from Harris County -- who had intervened as defendants only in their personal capacities, and whose seats were unaffected by the settlement, opposed the settlement and the joint motion to remand for a hearing on its effectuation. The state's Chief Justice, who was in the suit only in his official capacity as chair of the Judicial Districts Board, also argued separately against the settlement and the remand motion.

In late August of 1993, the Fifth Circuit, by a 9-4 vote, denied the joint remand motion, bifurcated the state's representation by permitting independent counsel for the Chief Justice, and reversed the district court by finding no section 2 violations in any of the nine targeted counties. 999 F.2d 831; LULAC App. 1a-202a.

Without ever explicitly saying so, the Fifth Circuit

rejected the argument that the state was the real defendant-party in interest. Instead, it determined that: (i) the Chief Justice's role as both chair of the Judicial Districts Board and supervisor of the state district courts permits him to override through separate counsel the Attorney General's legal authority, LULAC App. 9a-17a; (ii) the two individual-capacity judge intervenors had standing as incumbents and voters to continue prosecuting the appeal despite the settlement proposal;[2] LULAC App. 18a-21a, and (iii) district court consideration of the settlement proposal would be improper because, given the Fifth Circuit's ruling on the merits of the section 2 claim, no colorable claim could any longer be made that the settlement was against the backdrop of a possible legal violation, LULAC App. 21a-25a. It therefore denied the remand motion and reached the merits of the voting rights claims.

On the merits, the Fifth Circuit found legal fault with the district court's failure to take into account partisan voting patterns, its choice of which election contests between which minorities and whites to take into account, its failure to evaluate sufficient numbers of election contests, its failure to consider the effects of the eligible pool of lawyers on the degree of minority presence on the bench, its reliance on untraced societal effects of historical discrimination, and its failure to accord the appropriate legal weight to the state's interest in the linkage of the primary jurisdictional base to the electoral base for district judges. In reversing the district court's legal determination as to each of the targeted counties, the Fifth Circuit measured each county against

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[2] The opinion does not explain whether it views these two individuals' standing to extend beyond the two counties -- Dallas and Harris -- where they reside and serve to the other seven targeted counties. The standing principle of *Baker v. Carr*, 369 U.S. 186 , 204-08 (1962), limits their standing to their individual counties. They do not serve, or vote in the challenged judicial races, in any of the other counties.

varying combinations of the catalogued district court shortcomings and concluded that none of the judicial districts in any of the counties violated the effects prong of the amended section 2 of the Voting Rights Act. LULAC App. 28a-121a.

Four members of the court dissented from both the remand denial and the merits reversal in eight of the targeted counties. LULAC App. 130a-134a (Op. by Chief Judge Politz); 135a-202a (Op. by Judge King); 202a (Op. by Judge Wiener).

ARGUMENT

The important issue of when a state may enter into a proposed settlement of a voting rights case should be resolved by the Court, thereby making it unnecessary to reach difficult issues on the standards for deciding judicial election challenges under section 2 of the Voting Rights Act.

Three of the four questions presented by LULAC ask the Court to determine the standards applicable to challenges to state judicial election systems under the effects prong of amended section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.[3] If answered, one of the questions -- the third one set out in LULAC's certiorari petition -- would postpone any need to consider fundamental and difficult issues of liability under section 2 in judicial election challenges. The Court should avail itself of that opportunity by granting certiorari limited to Question 3 presented by LULAC.

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[3] The fourth question, about whether the Fifth Circuit should have remanded the case to the district court following remand from this Court, is included in this categorization deliberately. It really is asking the Court to decide how section 2 standards are to be applied and implemented in the federal judicial system.

The state is filing simultaneously with this memorandum a cross-petition for writ of certiorari in *Attorney General of Texas v. Entz*, No. _____. The state's cross-petition presents only the settlement question for review and asks that the Fifth Circuit be reversed for its failure to grant the joint motion to remand. The state elaborates there on its reasons for asking that the writ be granted.

Issues about the proper standards for measuring section 2 violations undoubtedly are as important as they are complex. Critical issues of federalism are at stake and are under current consideration elsewhere in the federal system. The Eleventh Circuit now has under consideration a petition for rehearing en banc in the Florida judicial election case of *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993), in which a panel (with different facts and without acknowledging the Fifth Circuit's en banc opinion in this case) found a violation of section 2. A panel of the same circuit recently has taken under submission a section 2 judicial selection case from Alabama, *Southern Christian Leadership Conference v. Evans*, No. 92-6257.

The state's view, however, is that issues of settlement in the voting rights context are more appropriate to take up now because they go to the remedy phase of these types of cases. Remedy lies in the foreground in every section 2 dispute, especially when judicial election systems are under challenge. In fact, the very first factor under the leading section 2 case, *Thornburg v. Gingles*, 478 U.S. 30 (1986), turns on the question of whether a meaningful remedy is possible. Thus, the state argues here that the Court should look to first things first, and in this case, the first thing is the settlement issue presented by LULAC.

CONCLUSION

The Court should grant LULAC's petition for writ of certiorari limited to Question 3.

Respectfully submitted,

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November 24, 1993

Attorneys for State Respondents

APPENDIX

FILED
NOV 14 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC COUNCIL #4434, ET AL.,	§	
	§	Civil Action No.
	§	
vs.	§	MO-88-CA-154
	§	
JIM MATTOX, ET AL.	§	

ORDER

Came on for consideration, Dallas County plaintiff/intervenors' Motion to Correct Clerical Mistake, and after having reviewed the pleadings, it is the opinion of this Court that said Motion is well taken and it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. Dallas County plaintiff/intervenors shall be noted in the style together with other plaintiff and defendant intervenors; and

2. at the conclusion of the paragraph numbered "3." that the following description of Dallas County plaintiff/intervenors shall be inserted: "plaintiff/intervenors from Dallas County, Jesse Oliver, Joan Winn White and Fred Tinsley, are black attorneys and citizens of Dallas County, Texas, each of whom is a former district judge from Dallas County, who was defeated in a county-wide election for district judges."

SIGNED this the 14th day of November, 1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
NOV 27 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434,	§	
et al.	§	
Plaintiffs,	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT is the State Defendants' Motion to alter or Amend this Court's Memorandum Opinion and Order of November 8, 1989 in the above-captioned cause. After this Court's Order was signed and entered, it was brought to the attention of the Court that

there were some clerical errors and omissions in this Court's Order. This Court is of the opinion that the State Defendants' Motion should be granted in part and denied in part. Accordingly,

IT IS ORDERED that this Court's previous Memorandum Opinion and Order be amended in part.

IT IS FURTHER ORDERED that the items telephonically communicated to this Court by Plaintiffs' Counsel be amended as follows:

1. The top of page 13 just before Finding of Fact number four be amended to reflect the following:

Plaintiff-Intervenors from Dallas County include Joan Winn White, Fred Tinsley and Jesse Oliver.

2. The last line of the second paragraph of Finding of Fact number eight on page 17 is amended to read, "... greater than fifty percent (50%) Hispanic voting age population were possible."

3. The second sentence of the first full paragraph on page 21 is amended to read, "Minority residents are concentrated largely in the Northeastern, East Central and Southeastern sections of Midland County."

4. Conclusion of Law number 16, as continued at the top of page 90, line one, is amended to include "Hispanic" after "Black" and the appropriate comma.

IT IS FURTHER ORDERED that items 1-3, 6 & 11 of the State Defendants' Motion are hereby GRANTED.

IT IS FURTHER ORDERED in connection with item 5 of the State Defendants' Motion that Finding of Fact 20.a. on page 49 is amended as follows:

Dr. Brischetto analyzed three (3) 1988 countywide judicial elections in Travis County. All three elections analyzed were County Court at Law Primary Elections.

IT IS FURTHER ORDERED that in connection with item 9 State Defendants' request is GRANTED IN PART to reflect that it was the 1986 Democratic Primary that was being discussed, rather than the Runoff Election. Item 9 is DENIED in all other respects.

IT IS FURTHER ORDERED that items 4, 7, 8 & 10 of

the State Defendants' Motion are hereby DENIED.

IT IS FURTHER ORDERED that this Court's Memorandum opinion and Order remains unchanged in all other respects.

SIGNED AND ENTERED this the 27th day of November, 1989.

/s/
LUCIUS D. BUNTON
CHIEF JUDGE

FILED
DEC 26 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

LULAC COUNCIL #4434, et al.,	§	
Plaintiffs,	§	
	§	Civil Action No.
vs.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.	§	
Defendants.	§	

ORDER

On this day came before the Court the State Defendants' Rule 60 (a) Motion to Correct Clerical Mistake. The motion is GRANTED. The last sentence of the last full paragraph on the second page of the Court's Order of November 27, 1989, is corrected to read as follows: "All three elections analyzed were 1988 Democratic Primary elections, two of which were for county court at law positions and one of which was for a district court position."

SIGNED and ENTERED this 26th day of December, 1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
DEC 28 1989
CHARLES W. VAGNER, Clerk
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC, et al.,	§	
Plaintiffs,	§	
	§	
vs.	§	NO. MO-88-CA-154
	§	
MATTOX, et al.	§	
Defendants.	§	

ORDER TO CORRECT CLERICAL ERRORS

1. In accordance with F.R.Civ.P. 60, the Court makes the following corrections of clerical mistakes in its Memorandum Opinion and Order of November 8, 1989:

2. On page 12, the following sentence is added to Paragraph 2: "Jesse Oliver, a Black from Dallas, testified that he is a member of LULAC."

3. On page 18, the following sentence is added to the end of the second complete paragraph of Paragraph 9: "This remains true when Plaintiffs controlled for voting age population of non-United States citizen of Spanish origin."

Done this 28th day of December, 1989, at Midland, Texas.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
JAN 2 1990
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434,	§	
et al.	§	
Plaintiffs,	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT are the parties with their respective Proposed Interim Plans, Motions to Certify this Court's Memorandum Opinion and Order, of November 8, 1989, for Interlocutory Appeal, and Motion of Bexar County District Judges to Intervene in the above captioned cause.

This case is reminiscent of several lines of a recent song, I'm for Love, by Hank Williams, Jr. The lyric goes,

"The city is against the county,
The county is against the state,
The state is against the government,
and
The highway still ain't paved."

In this case the Governor has been against the Attorney General, the Attorney General against the Legislature, the Judges against this Court, and the system is still flawed. This is a regrettable situation, but it can't be helped. The Hank Williams song goes on to say "But I'm for love, and I'm for happiness."

This case was filed on July 11, 1988 and originally set for trial on February 13, 1989. The Court was persuaded, at least on one occasion, to continue the trial to give the Texas Legislature a chance to address the issue during its Regular Session. This Court continued the above captioned cause to April 17, 1989 to await the United States Supreme Court's disposition of the Petition for Writ of Certiorari in the case of Roemer v. Chisom. The Court again continued the case to July 11, 1989, based on oral Motions to Continue made on the record during a hearing on Motions to Intervene held by this Court on February 27, 1989. The Court continued the trial to September 18, 1989, because of a conflict of settings with one of the attorneys. At the conclusion of the trial in September, the Court was requested to hand down its opinion prior to the convening of the Texas Legislature in Special Session so that a violation (if one was indeed found) could be looked at and perhaps remedied during the Special Session.

This Court specifically reserved ruling upon Plaintiffs' Motion for an order enjoining further use of the at-large election scheme in the affected counties until the State Legislature had an opportunity to offer a remedial plan. The Legislature went into Special Session on November 13, 1989, some five days after entry of this Court's November 8, 1989 Order. Governor Clements

deemed it advisable not to submit the question of judicial redistricting to the Special Session. The Governor did, however, request that he and this Court meet and discuss the matter. The meeting was held, and attorneys for both Plaintiffs and Defendants were present. The Governor advised the Court that no remedy would be forthcoming until some time after the March 13, 1990 Primary Elections. The Governor requested that the matter be delayed until the Regular Session of the Legislature in January 1991. He further advised the Court that, if this was not satisfactory, he would call a Special Session some time in April or May of 1990 and request the Legislature to study and take whatever action might be necessary to remedy the situation.

The timing is perhaps unfortunate. There will be a census taken in 1990, which may reflect some changes in population in the nine counties involved. Our Legislature meets in Regular Session only in odd years and inevitably somewhere down the line the method of selection or election of State District Judges will have to be submitted to the voters of Texas. The Court is of the opinion that a delay until after the Primary Elections are held in 1990 and a delay until after a Special Session of the Legislature is held in late spring of 1990 and a further delay of implementation of any solution by the Legislature would not be in the interest of justice, would further dilute the rights of minority voters in the target counties in question, and would be inequitable and work an even greater hardship on the judges and courts involved.

Because the Legislature took no action on the matter in Special Session in November and December, 1989, and the refusal of the Supreme Court to grant a writ in Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988), and the statements of the Governor of the State of Texas, and the imminence of the Primary Elections in 1990, the Court is not inclined to defer action. See Wise v. Lipscomb, 437 U.S. 535 (1978). Under these circumstances, this Court is of the opinion that it may fashion an interim plan that the law,

equity and justice require. Chisom, supra, at 1192. On December 12, 1989, or shortly thereafter, all parties were advised to file any Proposed Plans and objections with the Court by December 22, 1989. An Agreed Settlement was entered into by and between the Plaintiffs and Defendants in this matter, but was not approved by some of the Intervenors.

The Court should point out that the State Legislature will have still a third opportunity to propose a permanent remedy consistent with this Court's November 8, 1989 Order should it convene, and should it pass legislation in April or May of 1990.

The plan which follows is strictly an interim plan for the 1990 elections affecting 115 State District Court judicial seats in the nine counties in action. Upon consideration of the Motions, Responses, Objections, letters, exhibits, attachments and arguments of the parties, the Court is of the opinion that the following Orders are appropriate. Accordingly,

IT IS ORDERED that the Joint Motion of Plaintiffs, Plaintiff-Intervenors and the Attorney General of Texas for Entry of a Proposed Interim Plan is hereby GRANTED IN PART and DENIED IN PART in the following respects:

1. All Defendants and those acting in concert are hereby enjoined from calling, holding, supervising and certifying elections for State District Court Judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties under the current at-large scheme.

2. For the 1990 elections, according to the Secretary of State of Texas, one hundred fifteen (115) District Court elections are scheduled in the counties affected by this Court's Order. The following number of District Courts are up for election by respective county: Harris (36); Dallas (32); Tarrant (14); Bexar (13); Travis (6); Jefferson (6); Lubbock (3); Ector (3); and Midland (2).

Under this Interim Plan, District Court Elections in Harris, Dallas, Tarrant and Bexar Counties shall be

selected from existing State Legislative House District lines as indicated in Attachment A. District Court Elections in Travis County shall be from existing Justice of the Peace Precinct Lines. See Attachment A. District Court Elections in Jefferson, Lubbock, Ector and Midland Counties shall be according to existing County Commissioner Precinct Lines. Id. Each county shall be designated by a District Number, and each election unit by subdistrict number.

3. Each candidate shall run within a designated subdistrict and be elected by the voters in the subdistrict. Consistent with the Texas Constitution, each candidate must be a resident of his or her designated judicial district (which is countywide), but need not be a resident of the election subdistrict.

4. Elections shall be non-partisan. Each candidate shall select the election subdistrict in which he or she will run by designated place. Candidates in Dallas, Tarrant, Bexar, Ector and Midland Counties shall file an application for a place on the election ballot with the County Elections Administrator. Tex. Elec. Code Ann. §31.031 et seq. (Vernon 1986). Candidates in Harris, Travis, Jefferson and Lubbock Counties shall file such an application with the County Clerk of those counties or the County Tax Assessor-Collector, depending on the practice of that particular county. Tex. Elec. Code Ann. §§ 31.1031 et seq., 31.091 (Vernon 1986).

5. All terms of office under this Interim Plan shall be for four (4) years. Tex. Const. Art. V. §7 (1976, amended 1985). This Court is of the opinion that a two-year term is unfair to both those beginning and those ending their judicial careers.

6. Elections shall take place the first Saturday of May, 1990, with Run-off Elections to take place the first Saturday of June, 1990. Tex. Elec. Code Ann. §41.001(b)(5) (Vernon Supp. 1989).

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on March 26, 1990. Except as modified herein, all provisions

of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

8. In 1991, the Administrative Judge of the countywide district shall designate:

(1) Any courts of specialization in terms of docket preference; and

(2) The District Court numbers in use prior to the Interim Plan's adoption. Successful incumbents shall have preference in such designation.

9. Current jurisdiction and venue of the District Courts remain unaffected, subject to modification by rule of the Supreme Court of Texas.

10. There shall be no right of recusal of judges elected under this plan. This Court is of the view that such a measure would be extremely disruptive to District Court dockets, administratively costly and could be the source of abuse by attorneys attempting to gain continuances of their cases.

IT IS FURTHER ORDERED that the above Interim Plan applies only to the 1990 State District Court Judicial Elections in the nine target counties at issue in this case. If the Texas Legislature fails to fashion a permanent remedy by way of a Special Called Session in the spring of 1990, then this Court will put into effect a Permanent Plan for the election of State District Court Judges in the nine target counties in question.

IT IS FURTHER ORDERED that the Motions of Defendant-Intervenor JUDGE SHAROLYN WOOD, Defendant-Intervenor JUDGE HAROLD ENTZ and the State Defendants to Certify this Court's Memorandum Opinion and Order of November 8, 1989 as modified for clerical corrections on November 27, 1989 and December 26, 1989 for Interlocutory Appeal pursuant to 28 U.S.C. §1292(b) is hereby GRANTED IN PART.

IT IS FURTHER ORDERED that to the extent that such Motions request a stay of further proceedings in the above captioned cause such Motions are hereby DENIED.

IT IS FURTHER ORDERED that the Motion of Bexar County Judges TOM RICKOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE AND MICHAEL P. PEDEN to Intervene as Defendants in the above captioned cause is hereby DENIED.

This Court, of course, has granted the right for an Interlocutory Appeal. The request to stay proceedings pending the appeal is DENIED, because the Court does not feel that District Judges should be continued in office for an indefinite period of time. The right of the electorate to select judges in the year 1990 should not be denied unless, of course, interim action is taken by the Texas Legislature which changes the method of the selection and election of judges. The pressing need for the administration of justice in our state courts is recognized. It is the opinion of this Court that the plan set forth herein is the least disruptive that can be effected at this juncture. To allow Primary Elections in 1990 to be held in the same manner as they were in 1988 would be contra to the dictates of Fifth Circuit law and the Congressional Mandate of the Voting Rights Acts. Recognition that the November 8, 1989 Judgment has far-reaching effects is the reason for the allowance of an expedited appeal, and again the Court would encourage the Governor to call a Special Session to address the matter and, further, would request that the State Legislature remedy the current situation, as the Court is firmly of the opinion that any remedy other than this interim remedy should be done by duly elected legislators.

SIGNED and ENTERED this 2nd day of January, 1990.

/s/_____
LUCIUS D. BUNTON
CHIEF JUDGE

FILED
JAN 11 1990
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), et al.	§	
V.	§	MO-88-CA-154
JIM MATTOX, Attorney General of the State of Texas, et al.	§	

ORDER

BEFORE THIS COURT is the Motion of Attorney General Jim Mattox on behalf of the State of Texas to Alter this Court's Order of January 2, 1990; the Response thereto of Harris County District Judge Sharolyn Wood; and the Response thereto of Plaintiffs LULAC et al., Plaintiff-Intervenors Jesse Oliver, et al., and Plaintiff-Intervenors Houston Lawyers Association et al. Having considered said Motion and Responses, the Court is of the opinion that said Motion should be denied.

The Court is further of the opinion that other changes to certain terms of the injunction contained in that January 2, 1990 Order are proper. Specifically, the Court herein modifies the Order for the limited purpose of delaying the elections ordered pursuant to its Order, and

removing the expedited rights of appeal previously granted in this matter.

The Court believes that delaying judicial elections pursuant to its Order of January 2, 1990 is desirable for several reasons. First, the Court notes that Governor Bill Clements recently called a special session of February 27, 1990, to deal specifically with Texas' system of selecting judges. In the interests of comity and Federalism, legislatively directed remedial measures are preferable to measures ordered by this Court. Delaying the judicial elections ordered by this Court will serve these interests by giving the Legislature additional time. Second, judicial elections will still take place in 1990 under the modified Order, thus minimizing disruption of the Texas judiciary. Third, delaying court-ordered judicial elections will provide additional time for the United States Department of Justice to consider any remedy adopted by the Legislature before such elections occur. Fourth, delaying these elections will remove the need for expedited appeal to the Fifth Circuit by providing additional time for that Court to consider and rule upon this Court's Order before court-ordered judicial elections occur.

The Court urges the Legislature to consider in its deliberations a quotation from President Harry S. Truman, who said, "[w]e must build a better world, a far better world--one in which the eternal dignity of man is respected."

I. The Attorney General's Motion is Properly Asserted Pursuant to Rule 59(e), Fed. R. Civ. P., and This Court Retains Jurisdiction to Modify Its Order of January 2, 1990.

The Defendant-Intervenor Judge Wood of Harris County appears to question the effect of the Attorney General's Motion on the notices of appeal filed in this case by herself and Judge Entz, and the powers of this Court to modify the terms of the injunction contained in its Order of January 2, 1990. There is no serious dispute before the

Court that the parties to this case have the right under 28 U.S.C. Section 1292(a)(1) to appeal this Court's Order of January 2, 1990. If that Order were a judgment as to which the Attorney General's Motion is properly asserted under Rule 59(e), then the Parties' notices of appeal are ineffective, the Court retains jurisdiction to modify the judgment, and the deadlines for appeal are extended according to Fed. R. App. P. 4(b)(4). The Court believes that Order is such a judgment, and that this is the correct analysis.

A "judgment" for purposes of Rule 59(e), which provides for the amendment of a judgment and the postponement of the time for filing an appeal, is defined in Rule 54(a). See Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Section 2651 and cases cited therein. Rule 54(a) defines judgment as an "appealable order." 28 U.S.C. Section 1292(b) undisputedly makes this Court's Order of January 2, 1990 appealable of right. Therefore a motion to alter or amend the judgment is properly asserted under Rule 59(e).

The Attorney General's Motion would properly be brought under Rule 62(c), if jurisdiction of the case were already lodged in the court of appeals, for example where a Rule 59(e) motion was not timely made and appeal was taken, or a Rule 59(e) motion was made and ruled upon, and appeal subsequently taken.

The Court assumes for the purposes of this Motion that there exist other circumstances that would make a Rule 59(e) Motion improper here, although the Court takes pains to note that the parties have not cited the Court to such circumstances, and the Court in examining its jurisdiction has so far found none. In that event, Judge Wood contends, the Attorney General's Motion is one properly asserted under Rule 62(c), under which Rule this Court's modification power are curtailed.

The Court also assumes that its sua sponte alteration of a judgment, that is independent of and goes beyond the alteration requested by a party under Rule

59(e), might be reviewed under the standard of Rule 62(c). The problem is that the timely filing of a Rule 59(e) motion, which the Court believes has been done here, suspends the appeal process and renders Rule 62(c) technically inapplicable because the case is not on appeal. Absent appeal, a district court has complete power over its interlocutory orders. Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2nd Cir. 1962).

It is important to note that this Court has consistently voiced its preference for the Texas authorities devising a plan for judicial elections consistent with the Voting Rights Act, with reasonable dispatch, and therefore has considered and styled its January 2, 1990 injunction as an interim plan. The Order is, of course, binding and effective if, and to the extent, the Legislature fails to act. If the Legislature devises an acceptable plan under the Voting Rights Act this lawsuit, and the Court's injunction along with it, would likely become moot. Of course, an argument could be made that this Court's interim plan of redistricting, because conditional in this sense, is not a judgment at all until the contingency has been removed, and therefore is not even appealable. In any event, this Court's overall plan of encouraging legislative redistricting is, the Court believes, relevant to considering, under the law of Rule 62(c), what constitutes a modification of an injunction "in aid of appeal."

In sum, the Federal Rules of Civil Procedure do not seem to provide a neat category for classifying motions on equitable remedies such as the one at issue. This Court is of the opinion that the Attorney General's Motion is one properly brought under Rule 59(e) because this Court's Order of January 2, 1990 is a "judgment" within the meaning of Rule 54(a). However, in the event this characterization is error, as Judge Wood seems to contend it is, the Court believes it proper to apply the more restrictive analysis under Fed. R. Civ. P. Rule 62(b) as set out in cases cited by the parties.

II. Alternatively, This Court Possesses Jurisdiction to Make Modifications to Its January 2, 1990 Order as Ordered Herein Pursuant to Rule 62(b), Fed. R. Civ. P.

Judge Wood challenges this Court's jurisdiction to entertain a motion to modify its January 2, 1990 Order, and presumably as well the Court's jurisdiction to modify said Order sua sponte. However, despite Judge Wood's artful choice of quotations from pertinent case law, the Court is not persuaded that it lacks jurisdiction to make certain changes in its Order even if the injunction contained therein is properly on appeal.

Once appeal is taken from an interlocutory judgment (as the Court assumes for discussion purposes that is has been here), Fed. R. Civ. P. 62(c) provides that "the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal. . . ." The scope of this Court's power under Rule 62(c) has most recently been the subject of analysis by the Fifth Circuit in Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989). Under the holding in Coastal, this Court is definitely constrained insofar it lacks authority to dissolve the injunction on appeal. Id. at 821. But regarding less radical modifications, the Court is directed to limit the exercise of its power to "maintaining the status quo." Id. at 820.

Judge Wood would have the Court interpret "maintaining the status quo" to mean that this court may do nothing except "in aid of the appeal." Willie v. Continental Oil Co., 746 F.2d 1041 (5th Cir. 1984). The Fifth Circuit applied this directive in Willie to divest the District Court of jurisdiction to modify a judgment under Rule 60(b) because of inadvertence or excusable neglect, where substantive rights of the parties were at stake. Id. at 1045. In Willie, the parties sought to have the District Court correct its judgment to incorporate a mistakenly-omitted stipulation regarding the percentage of liability to be borne by one of the defendants. The District Court was

empowered to deny such a motion because denial would be "in furtherance of the appeal". But had the District Court wished to grant the Rule 60(b) motion, leave of the Court of Appeals would have been required. Id. at 1046.

In the Coastal case, however, the Fifth Circuit seemed to impose a different standard of "maintaining the status quo," and defining that standard to mean that a district court may not take action, such as vacating an injunction, that would presumably divest the court of appeals from jurisdiction while the issue is on appeal. Coastal, supra, at 820. Cases cited in the Coastal opinion consistently deal with granting or staying injunctions during the pendency of appeal. Id. Consistent with the analysis expressed in the Attorney General's brief, this Court interprets Coastal to say that it may not vacate the injunction now in issue while it is on appeal. No such action is contemplated.

Even if the "in aid of appeal" standard set out in Willie should guide the Court, it would seem that the modifications now ordered, which primarily give the Legislature additional time to consider redistricting, does not violate that standard.

Accordingly, this Court's Order of January 2, 1990 will be amended.

IT IS ORDERED that this Court's Order of January 2, 1990 be, and is hereby amended pursuant to the following directive only.

Item number "6" at pages 6 and 7 is amended to read as follows:

> 6. Elections shall take place on November 6, 1990 with runoff elections, if and where necessary, on December 4, 1990.

Item numbered "7" at page 7 is amended to read as follows:

> 7. An application for a place on the non-partisan election ballot must be filed not later than

6:00 p.m. on September 19, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

IT IS FURTHER ORDERED that any rights of expedited appeal granted in this matter be, and are hereby RESCINDED.

SIGNED AND ENTERED this 11th day of January, 1990.

/s/
LUCIUS D. BUNTON
CHIEF JUDGE